entered. We are here concerned only with the order granting judgment for this balance sum.

The defendants' defence for the claim for $40,800 can be found in paras 14, 15, 16 and 17 of the affidavit of Kok Chu Pa filed on 13 April 1985. They contended that a sum of $40,800 for 'E 3 clearance' of the plaintiffs' vessels in Indonesia would be handed over to the plaintiffs to be given to CV Celcon Aneka. The plaintiffs have failed to forward this cash advance to CV Celcon Aneka. This would give rise to a counterclaim for this amount.

The defendants had also relied upon a breach by the plaintiffs in refusing to carry on with the work of transportation of the sand in their vessels. They contended that this was a wrongful repudiation on the part of the plaintiffs. This contention, however, is not supported by any documentation or other evidence adduced.

The plaintiffs in response have denied these allegations. They maintained that the vessels were withdrawn from the service of the defendants by reason of their default of payment of hire. The hire was due for payment within seven days of the presentation of invoices. The plaintiffs had referred to the exhibits 'KCP 16' and 'KCP 17' in the affidavit of Kok Chu Pa filed on 13 April 1985 on behalf of the defendants.

These exhibited letters were written by the defendants acknowledging that there was an outstanding amount of $69,767.05 due to the plaintiffs. This sum is lesser than the claim of $79,967.05 by $10,200. The letters 'KCP 17' and 'KCP 18' had mentioned that the sum of $10,200 had been paid to one 'Miss Tan' of the plaintiffs.

It is an established principle of law that as long as delivery of the goods shipped has been made, freight must be paid. There cannot be deducted from the freight any claim for damage to the goods. See *Dakin* v *Oxley*.[1] Liability for freight can be avoided only when the goods are delivered in such a condition that they are substantially and in a mercantile sense different from those shipped: see *Asfar* v *Blundell*.[2]

These cases limit the types of counterclaim or defences which may be available against claims for freight charges. From the affidavits filed by the defendants, no acceptable defence has been adduced.

A further affidavit was filed on 16 April 1986 by the plaintiffs after the notice of appeal was filed. There is exhibited as 'CSN 1' to this affidavit an unqualified admission addressed to the plaintiffs signed by two directors of the defendants in the name of the defendants stating that $79,967.05 (ie the full sum claimed in this action) was due to the plaintiffs. The defendants asked that confirmation of this be given to the defendants' auditors; this was done on 16 January 1986.

The defendants stated that the sum claimed to be due to the plaintiffs was reflected in the defendants' account as at 30 September 1985. The application for summary judgment was made on 8 March 1985 and the application was heard on 25 November 1985. This is an unqualified admission of debt by the defendants made even after summary judgment had been applied for. In spite of the appeal coming before me well after four weeks of the filing of the plaintiffs' affidavit on 16 April 1986, the defendants made no effort to qualify or explain away that admission.

For these reasons stated earlier and on the defendants' unqualified and unexplained admission, the appeal must be allowed with costs and judgment entered accordingly for the balance of the claim.

Appeal allowed.

Solicitors: *Shyam & Chew* ; *Cheng Fong & Tan.*

Reported by *Ng Sheau Jiuan*

Globe Trawlers Pte Ltd v National Employers' Mutual General Insurance Association Ltd & Anor

HIGH COURT (SINGAPORE) – SUIT NO 4179 OF 1981
THEAN J
17 JANUARY 1989

Insurance – Fire policy taken out by plaintiffs with first defendants – Policy covered fishing trawlers under construction – Occurrence of fire – Substantial damage caused – Dispute on first defendants' liability – Whether there was material misdescription of property to be insured – 'One complete unit of wooden fishing trawler' – Meaning of – Whether damage caused by plaintiffs' wilful act

Words and Phrases – 'One complete unit of wooden fishing trawler'

The plaintiffs were incorporated with the objects of building coastal fishing trawlers and other vessels. Soon after incorporation, the plaintiffs embarked on the construction of the two fishing trawlers, the 'Coastal Monitor II' and the 'Super Trawl'. The plaintiffs took out fire policies on the two vessels with the first defendants through the second defendants who were insurance brokers. In the policy, the 'Super Trawl' was described as 'one complete unit of wooden fishing trawler with engine motor and accessories and equipment'.

A fire broke out in the plaintiffs' workshop one day and at the time of the fire, the 'Super Trawl' was substantially built but not wholly completed. The fire destroyed or damaged the bow, the forward deck and the cabin of the vessel. The 'Coastal Monitor II', however, was not burnt but there were cracks on the glue at the timber joints and hull.

The first defendants contended that there was a material misdescription of the property to be insured in the proposal forms submitted for insurance in that the words 'complete unit

of wooden fishing trawler' meant a completed trawler and not one under construction. In view of the defence of material misdescription on the proposal forms, the plaintiffs joined the second defendants in this action on the basis that the second defendants were liable for negligence in failing to advise the plaintiffs in effecting the policy. The first defendants' other defence was that the damage was caused by the plaintiffs' wilful act or with their connivance.

Held, allowing the plaintiffs' claim against the first defendants and dismissing their claim against the second defendants:

(1) As a matter of strict construction, the words 'complete unit' do not mean a completed unit but the whole or the entirety of the unit. Construed in this way, there was no misdescription.

(2) The proposal forms submitted to the first defendants through the second defendants should be looked at and the descriptions of the vessels therein should be construed against the 'factual matrix of the background' at the relevant times. Against this background, it is clear that the word 'complete' in the proposals did not mean 'completed' but the whole or the entirety, ie all that which was to go with the trawler.

(3) On the evidence, it is clear that the second defendants were at the material time agents of the first defendants in relation to the policies issued to the plaintiffs. The second defendants knew that the vessels were under construction, and as the second defendants were agents of the first defendants their knowledge was imputed to the first defendants.

(4) The burden of proving that the fire was caused by the wilful act of the plaintiffs or with their connivance lies with the first defendants. The first defendants have not proved this on a balance of probabilities.

(5) On the evidence, the 'Coastal Monitor II' had not suffered any significant damage which cannot be repaired. The plaintiffs were not entitled to treat the damage as a total loss and they have not sought to prove their loss by showing the cost involved in repairing the damaged part, nor have they proved their loss in any other way. No award of damages on the 'Coastal Monitor II' was thus given. As regards the 'Super Trawl', the first defendants have not seriously disputed the quantum claim of the plaintiffs, nor did the first defendants call any surveyors or adjusters to give evidence on whether any adjustment should be made to the amount of costs of construction. In the circumstances, the claim of the plaintiffs on the 'Super Trawl' was allowed to the extent of the amount insured.

(6) The second defendants, in filling the proposal forms, were under a duty to use such care as was reasonable in the circumstances towards ensuring that the information recorded therein accurately represented the information given to them by the plaintiffs. They recorded the information in the forms which they then passed on to the plaintiffs who approved and signed the forms. If there was any misdescription in the proposal, the plaintiffs have themselves to blame and have no claim against the second defendants.

[*Editorial Note*: The first defendants have appealed to the Court of Appeal vide Civil Appeal No 13 of 1989.]

Cases referred to

1 *Woolcott* v *Excess Insurance Co Ltd* [1979] 1 Lloyd's Rep 231 (refd)
2 *Slattery* v *Mance* [1962] 1 QB 676 (folld)
3 *O'Connor* v *BDB Kirby & Co* [1972] 1 QB 90 (folld)
4 *London Borough of Bromley* v *Ellis* [1971] 1 Lloyd's Rep 97 (distd)
5 *McNealy* v *The Pennine Insurance Co Ltd & Ors* [1978] 2 Lloyd's Rep 18 (distd)

John Thomas QC (*Balachandran s/o Ponnampalam* with him) for the plaintiffs.
Cheong Yuen Hee for the first defendants.
KK Tang for the second defendants.

Cur Adv Vult

Thean J: The plaintiffs, a company now in liquidation, were incorporated on 2 March 1981 with the objects of, inter alia, building coastal fishing trawlers and other vessels. Initially, the shareholders of the plaintiffs were Fritz H Schneppe and Ingrid Schneppe, who are husband and wife, and one Oliver Koh Kok Geang. They were subscribers to the memorandum of association; they subscribed one share each in the capital of the company and were named the first directors in the articles of association. Immediately after the plaintiffs were incorporated, Fritz Schneppe and Ingrid Schneppe each subscribed for further shares for cash in the company and the total number of shares held by them is 349,999 of $1 each plus one share held by Oliver Koh, presumably as their nominee. Later, another couple, Vinayak Chaudhari and Bridgitte Chaudhari, each subscribed 12,500 shares at a premium of $1 per share for cash in the capital of the company. In consequence, these two couples, Mr & Mrs Schneppe and Mr & Mrs Chaudhari hold or own the entire issued share capital of the plaintiffs.

Soon after the incorporation, the plaintiffs embarked on the construction of two fishing trawlers and for that purpose rented from the Port of Singapore Authority ('PSA') a workshop, which was a cover shed, situated in an enclosed area known as the Royal Navy Arms Depot (East), Godown 218, Sembawang. The enclosed area was a protected area which was accessible through a gate or entrance manned by guards. The two fishing trawlers were called 'Super Trawl' and 'Coastal Monitor II'; of the two the 'Super Trawl' was the bigger one.

The two trawlers were designed by Fritz Schneppe ('Schneppe') and were made mainly of wood with the exception of the superstructure parts such as trawling masts and supporting items. In connection with their construction, the plaintiffs applied to Germanischer Lloyd of West Germany for classification, and submitted to them the requisite drawings of the trawlers. A classification, '+100 A4K (Coastal Service) Fishing Vessel/Exp', was approved. Germanischer Lloyd had an office in Singapore, and one Artur Guenter Foedish (PW2) is the principal surveyor of Germanischer Lloyd here and is responsible for the society's activities in South-east Asia.

He is qualified both as a naval architect and a naval engineer. While the construction of the trawlers was in progress he went to the worksite frequently and supervised the works. The construction had been concentrated on the 'Super Trawl' as the plaintiffs intended to complete it by the end of May 1981 hoping to have it in time for the Asian Fishing and Aquaculture Exhibition and Conference 1981 which was scheduled to be held in early June at the World Trade Centre.

The plaintiffs took out the following insurance policies with the first defendants, namely, a workmen's compensation policy, no SW/8008, a fire policy no S/55259, and a burglary policy no SB/5126. The second defendants are insurance brokers, and they assisted the plaintiffs in effecting all the three policies with the first defendants. The workmen's compensation policy was dated 2 March 1981 and was expressed to cover the period from 26 February 1981 to 25 May 1981 but was subsequently extended, with a reduction of the number of workers, to 25 June 1981. The fire and burglary policies were both dated 23 May 1981 and were expressed to cover the period from 25 May to 25 June 1981. Initially, only the 'Super Trawl' was insured in both the policies and was described as follows:

> On one complete unit of wooden fishing trawler with engine motor and accessories and equipment, the property of the insured or held by them in trust for which they are responsible in the event of loss or damage by fire or lightning whilst contained in the building constructed wholly of corrugated iron sheets occupied as workshop and store situate and known as godown 218 RNAD (east), Sembawang Wharves, Singapore.

And the amount insured was $600,000. Both the policies were extended with effect from 5 June 1981 to 5 August 1981 by an endorsement to cover two other items of property for the amounts as follows:

Item no 2:	On machinery, utensils and hand tools including materials, the property of the insured whilst contained in the building referred to and described in item no 1 ... S$50,000
Item no 3:	On one complete unit of wooden fishing trawler with engine, motor, accessories and equipment, the property of the insured whilst contained in the building referred to and described in item no 1 ... S$500,000

By early June 1981 the 'Super Trawl' was substantially built but not wholly completed; the hull had been completed, and certain equipment, machinery and engine had been installed. The 'Coastal Monitor II', however, was still at an initial stage of construction, and from photographs produced only a skeleton of the hull had been built. The Asian Fishing and Aquaculture Exhibition and Conference was held between 2 June and 6 June 1981 at the World Trade Centre, and the plaintiffs participated in the exhibition; they rented a stand at the exhibition, and exhibited, amongst other things, photographs of the 'Super Trawl'. The exhibition ended in the afternoon of 6 June 1981.

In the early evening, at about 6 pm on 6 June 1981, a fire broke out on the 'Super Trawl' and substantially destroyed or damaged the bow, the forward deck and the cabin of the vessel. The 'Coastal Monitor II', however, was not burnt. After the fire both the vessels were declared by Germanischer Lloyd to be unacceptable for classification. Foedish who inspected the vessels twice after the fire reported in writing on the extensive damage in the 'Super Trawl'. As for the 'Coastal Monitor II' he reported that there were cracks on the glue at the timber joints and hull. The plaintiffs treated the damage to each of the vessels a total loss and made a claim therefor under the fire insurance policy. The first defendants did not settle or meet any part of the claim and, in consequence, the plaintiffs instituted these proceedings against the first defendants claiming for an indemnity under the fire insurance policy. Liability was disputed.

The first defendants raised three defences: (i) there was a material misdescription of the property to be insured in the proposal forms submitted for insurance; (ii) the claim by the plaintiffs is fraudulent, and (iii) the damage was caused by the plaintiffs' wilful act or with their connivance. Initially, only the first defendants were sued in this action, but in view of the defence of a material misdescription in the proposal forms the plaintiffs joined the second defendants in this action. The claim against the second defendants is that if the first defendants should succeed in the defence of a material misdescription, the second defendants were guilty of negligence in failing to advise the plaintiffs in effecting the insurance policy. The defence of the second defendants is merely one of denial of negligence.

I propose to consider first the claim of the plaintiffs against the first defendants and the defences raised by the latter, and thereafter the claim by the plaintiffs against the second defendants. The claim of the plaintiffs against the first defendants is simple and straightforward. They had insured their vessels against the risk of fire, and a fire had occurred which destroyed or damaged their vessels. It is not in dispute that the fire insurance policy no S/55259 had been issued by the first defendants and was in force at the material time; nor is it in dispute, though the first defendants did not admit it in their defence, that a fire on the 'Super Trawl' did take place on 6 June 1981 and damage was caused by the fire. Hence, unless the first defendants succeed in establishing any one or more of the three defences they are liable to the plaintiffs under the policy. I now turn to consider the three defences seriatim.

In respect of the first defence, the first defendants relied on condition 1 of the policy which provides that if there is any misdescription of, inter alia, the property insured the defendants shall not be liable on the policy so far as it relates to the property affected by such misdescription. In the proposal forms dated 22 May and 5 June 1981 submitted by the plaintiffs to the first defendants through the second defendants the property to be insured was described as 'one complete unit of wooden fishing trawler with engine motor and accessories and equipment'. It is contended by the first defendants that the words 'complete unit of wooden fishing trawler' means a completed trawler and not one under construction and therefore that was a material misdescription. It is not, however, the case of the first defendants that the plaintiffs should have expressly described the unit as one 'under construction' and that the failure to insert these words amounts to a misdescription. As a matter of strict construction, the words 'complete unit' do not mean a completed unit but the whole or the entirety of the unit. Construed in this way, there was, therefore, no misdescription.

I propose to consider this question on a broader basis. In my view, the proposal forms submitted to the first defendants through the second defendants should be looked at and the descriptions of the vessels therein should be construed against the 'factual matrix of the background' at the relevant times. The first defendants had in early March 1981 issued to the plaintiffs a workmen's compensation policy and they knew that the plaintiffs were engaged in the business of building wooden trawlers at the latter's workshop in Sembawang. This was stated in the policy. At the time when the fire and burglary policies were issued the workmen's compensation policy was extended, though with a reduced number of workmen. They certainly knew at that time, if they had not known earlier, that the plaintiffs were building fishing trawlers. This knowledge was admitted by Lim Chun Kwi (DW4) in evidence. He is the marketing manager of the first defendants. The first defendants, in my view, knew or would have known that the worksite or yard, where the vessels were, was a construction and storage yard and not a wharf at which a vessel could be anchored: see the description in the proposals. Further, the proposal for the 'Coastal Monitor II' was submitted on 5 June 1981 and the endorsement on the fire policy was issued by the first defendants on 19 June 1981. The first defendants therefore must know what the description meant as they were prepared to issue the endorsement even after the fire. Against this background it is clear that the word 'complete' in the proposals did not mean 'completed' but the whole or the entirety, ie all that which was to go with the trawler. It is significant that the first defendants had never raised this point of material misdescription immediately or soon after the fire or even soon after they had appointed surveyors and adjusters; it was raised for the first time when the defence was filed. I do not accept the evidence of DW4 that the first defendants do not insure vessels under construction but only completed vessels. Apart from this bald statement there was no evidence in support. I am far from convinced by what he said.

Lastly, there is, in my view, also one difficulty in the way of the first defendants' defence of material misdescription. On the evidence, it is clear that the second defendants were at the material time agents of the first defendants in relation to the three policies issued to the plaintiffs. The second defendants were carrying on the business of general insurance agents and were commission agents of the first defendants. They were paid a commission for business referred or brought to the first defendants. Robert Tan (DW5), a director of the second defendants, admitted that as agents for the first defendants the second defendants looked for business for the first defendants. The transactions relating to the three policies were procured by them for the first defendants. Robert Tan in completing the proposal forms was able to rate the risk and calculate the premium, and both these matters were inserted therein by him. It is clear that he was authorized to work out the rate and premium in consultation with the first defendants.

The next question is whether the second defendants through Robert Tan knew at the material time that the two trawlers were under construction at the workshop in Sembawang. Robert Tan acknowledged that at the time when he was introduced to Schneppe he knew that the plaintiffs were building wooden fishing trawlers. On the evidence, it is clear that Robert Tan at all material times knew that the fire policy was to cover the two fishing trawlers under construction. I think that discussions between him and Schneppe on the appropriate policy to be taken out on the two vessels must have taken place, and that Schneppe must have told him that the plaintiffs were building the two trawlers. I accept Schneppe's evidence that he would like to take out a marine policy to cover the two vessels but was advised by Robert Tan at that time that the plaintiffs should take out a fire policy and a burglary policy, which the plaintiffs did. That advice was founded on Robert Tan's knowledge that the two vessels were under construction. The words in the proposal forms were written by Robert Tan and approved by Schneppe. I do not accept Robert Tan's evidence that he did not know at the material time that the vessels were under construction and in particular his evidence that he formed the impression that in each case (when the proposal form was completed) the vessel was completed; that Schneppe asked him to insure 'one complete unit', and that he obtained that description of the vessels from Schneppe. On the evidence I find that the second defen-

dants knew that the vessels were under construction, and as the second defendants were agents of the first defendants their knowledge was imputed to the first defendants: see *Woolcott* v *Excess Insurance Co Ltd.*[1] For the reasons I have given, this defence of the first defendants fails.

On the second defence, the first defendants rely on condition 13 of the policy. It would be helpful to set out this condition verbatim, as this is also a condition relied upon by the first defendants in relation to the next defence which I shall consider in a moment. Condition 13 provides:

> If the claim be in any respect fraudulent or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in the case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefits under this policy shall be forfeited.

The first defendants merely made a bald assertion that the plaintiffs' claim is fraudulent and it seems to me that the basis for saying that is that the claim is grossly exaggerated. Assuming that the claim is grossly exaggerated, the first defendants must go further to show that such exaggerated claim is a fraudulent claim. On this, there was not a shred of evidence in support. This defence has no merit whatsoever and I have no hesitation in rejecting it.

The main defence relied upon by the first defendants is that the fire was caused by the wilful act or with the connivance of the plaintiffs, and in this connection condition 13 of the policy is again relied upon. Paragraph 10 of the defence says that the 'alleged loss or damage was occasioned by the plaintiffs' wilful act or with their connivance on or about 6 June 1981 at the premises mentioned in the statement of claim'. However, no particulars of the plaintiffs' wilful act or connivance were given. I must confess I did not have the slightest notion of any factual basis of this defence until expert evidence was adduced by the first defendants.

I now turn to examine the evidence relating to the fire. The evidence of Fritz Schneppe is this. On the afternoon of 6 June 1981, which was the last day of the exhibition, he borrowed a pick-up from his foreman and took a dashboard or sheerboard to the yard. That was about 3.30 pm. When he drove to the yard he saw the guards at the gate and they let him in. He left the dashboard or sheerboard at a spot near the vessels. He was there for about five to ten minutes. He then left and went home. At about 5.30 pm while he was at home, he received a telephone call from one of the guards at the yard who said that there was smoke coming out from his vessel. He immediately rushed to the yard together with his wife. On arrival there, Schneppe parked the car at the guardhouse, and one of the guards told him that there was no more smoke coming out from the vessel. Schneppe and his wife and one of the guards then walked to the vessel, the 'Super Trawl', and all three of them went on board with a ladder. They went to the stern where the engine was. Schneppe and the guard lifted the cover of the hatch to the engine room. It was dark inside and so he asked the guard for a torch; the latter informed him that there was a torch at the guardhouse. All three of them then walked back to the guardhouse with a view to fetching the torch. On their way back, when they were near the guardhouse, a fire broke out on the 'Super Trawl'. He asked one of the guards to call the fire brigade, which the latter did, and the fire brigade came about 45 minutes later and extinguished the fire.

Schneppe's wife, Ingrid Schneppe (PW8), also gave evidence and substantially corroborated Schneppe's evidence. She said that when the fire broke out, it was frightening and glass was falling down. She was shocked.

One of the guards, Abdul Latif bin Talib (DW2), was called by the first defendants; the other guard could not be traced. DW2 confirmed that on the afternoon of 6 June 1981, the day of the fire, Schneppe did drive a pick-up to the yard and went to the site where the boats were and was there for about 15 minutes. That, he said, was about 3.30 pm. After that Schneppe left. Soon or immediately thereafter he walked round and inspected the boats and he smelled and saw smoke coming out from the ventilation grill at the top of the mast at the stern of the 'Super Trawl'. He went back to the guardhouse and informed the other guard called Karim. Karim and DW2 then went to look at the 'Super Trawl'; they went quite near to the boat and saw smoke, but very little smoke, coming out. They returned to the guardhouse and Karim telephoned Schneppe at his house. DW2 then went back to the boat and this time he did not see any smoke. He and Karim waited for Schneppe at the guardhouse. Schneppe and his wife came in a car; it was an SZ vehicle, he said. Schneppe parked the car by the side of the guardhouse, and Schneppe, his wife and DW2 then walked to the site where the 'Super Trawl' was. They went on board and checked the boat; there was no smoke. They then went to the stern and all of them jointly lifted the cover of the hatch to the engine room. There was no smoke coming through the hatch from below. Schneppe asked for a torch. As DW2 did not have a torch with him and as there was one at the guardhouse, he left for the guardhouse to fetch it. Both Schneppe and his wife remained behind. At the guardhouse he told Karim that Schneppe wanted a torch and Karim took the

torch to the boat. Sometime later, all three of them went back to the guardhouse and said that there was a big fire and they could not control it. Karim telephoned for the fire brigade which later came and extinguished the fire.

There was one material discrepancy between the evidence of Schneppe and his wife and that of DW2. According to Schneppe and his wife, they left the boat together with DW2 and all three of them walked to the guardhouse to fetch a torch. According to DW2, Schneppe and his wife remained behind while he went to the guardhouse. I am inclined to accept the evidence of DW2 on this point. It is more likely that Schneppe and his wife remained behind while DW2 went to the guardhouse. There is no reason why Schneppe and his wife should accompany DW2 and walk all the way to the guardhouse for the torch.

On the evening of the fire, between 8 pm and 9 pm, PP Kanthan (PW4), then the police inspector of PSA, went to the site. On his arrival there he found the fire brigade had already extinguished the fire. He then commenced his investigation on the cause of the fire. For the purpose of his investigation he classified the incident as 'mischief fire'. The following morning he enlisted the assistance of the port chemist, Ong Eng Cheong (PW3), who went to the yard at about 10 am. Ong went on board the 'Super Trawl' and at that time there was no one on board. He examined the burnt area and noticed that the forward deck and the whole cabin were badly burnt and charred. He brought along an explosimeter and tested the atmosphere for the presence of inflammable vapours, but he was unable to detect any. He checked the various parts of the trawler and the corners and put the meter on the charred areas, but no inflammable vapour was found. He was unable to ascertain the cause of fire.

In the course of his investigation PP Kanthan interviewed and took statements from Schneppe, the guards and also the workers. About two months later, when the investigation was concluded, the incident was reclassified as 'suspected mischief and that no offence was disclosed'.

That was all the evidence of primary facts (in so far as material) relating to the fire, and there was no evidence as to the cause of the fire. Both the plaintiffs and the first defendants, however, adduced expert evidence to show where the fire could have started and the cause of the fire. The plaintiffs called one Barry Ian Dillon who has worked as a consultant in the investigation of fires in Australia for a number of years and has had experience of investigating fires in Taiwan, Hong Kong and various countries in South-east Asia. He was first instructed on the fire in question in September 1987, and therefore had no opportunity of examining the vessels. His investigation was based on the photographs and documents produced and the notes of evidence of the trial during the first few days, and, of course, on what he was instructed. He compared the set of photographs, P2 and P13, taken on behalf of the plaintiffs with the set of photograghs, D4, taken on behalf of the first defendants. From the extent and areas of damage of the 'Super Trawl' as shown in the photographs, his views on the fire are as follows. First, the fire could not have started in the cabin, burnt through the deck and spread forward and sideways and then to the bottom of the boat. In his experience, fire burns up and out rather than 'tunnelling down'. What he saw in the photographs is a common pattern of a 'V' shape fire spreading upwards and sideways. Fire spreading upwards is always more rapid than downwards and damage to timber increases as it goes up. Secondly, in view of the pattern of damage, there was only one location where the fire could have started and that was in the forward area of the boat below deck in front of the water tank. Thirdly, it is feasible that the fire originated from a smouldering fire which was caused by a lighted cigarette butt smouldering at or around the area in front of the water tank. His conclusion is this, and I quote verbatim his testimony:

> There are two main possibilities for the cause of the fire: one, accidental in origin, and the other, deliberate. A mechanism exists for accidental. It is possible that a smouldering fire was started at or around the tanks in the hold when men were working on the boat or visiting the boat. It is feasible that a smouldering fire, amongst the sawdust, would have remained in existence for a day or more and erupting into a flaming fire either naturally or when an event occurs, such as the opening of a hatch. So I find the smouldering fire is quite feasible and I think it is the most likely cause. I am not able to discount the possibility of a deliberate fire but I find the location at the front of the boat to be an odd one for a deliberate fire. A fire at that location has to work itself around the water tanks and is not consistent with a serious attempt to destroy the vessel.

Dillon's evidence on the seat and cause of the fire was challenged by another expert, Alan Mitcheson (DW3), called by the first defendants. Mitcheson is a partner of Dr JH Burgoyne & Partners, a well-known firm of consulting scientists and engineers specializing in the investigation of fires and explosions. He received instructions sometime in August 1981 and he visited and inspected the vessels on 17 August 1981 and took a set of photographs, D4. That was the only occasion he looked around and inspected the vessels. He confirmed that as regards the 'Super Trawl' the cabin was extensively burnt and the bow section was also burnt and the extent of the burning at the low level in the bow was quite great. He then noticed a hole in the floorboard in the forward starboard corner of the wheelhouse; the hole was in two sections – about one foot or nine inch square. Mitcheson then took some measurements of charring in order to determine the areas which had been burning for a long time and those burning for a short while. From the measurements he took at various parts of the bow and the cabin, a pattern emerged as follows: at the bottom of the

bow the depth of charring was less than that at the deck level and in the cabin area the depth of charring was even greater. The charring pattern shows that fire was burning for a longer time above the deck than below and this type of damage is consistent with the application of a flammable liquid to the floor, ie the area where the hole was, and, in his view, the charring pattern, as shown by the depths of char measurements, shows unequivocally that the fire originated in the cabin and not in the bow section. His conclusion is that the fire started in the cabin at the spot where he found the hole and was caused by flammable liquid applied to it by human agency.

As the pattern of charring given by Mitcheson was not put to Dillon in the cross-examination of the latter, I gave leave to counsel for the plaintiffs to recall him. He re-affirmed his view on the seat of fire (after hearing what Mitcheson had said) and said that the pattern of charring was consistent with his view on the origin of fire. His main objection to the measurements of charring appears to be that the readings of charring, or most of them, were taken on vertical direction. In his view, one must look at the immediate environment. At the lowest point of the fire air could enter the vessel and exit in the form of hot gases, and as the fire burnt upwards the top of the fire would be the hottest. In such a situation charring would increase with increasing height. After the fire the place or the spot where the fire started no longer existed; it would have been burnt or hacked away. He referred to and relied on two drawings which he had prepared after hearing Mitcheson and in which he inserted roughly the readings given by Mitcheson – one vertical and one horizontal – showing the patterns of charring. With the vertical charring pattern he said he would expect the fire to start at the lowest point and with the horizontal pattern he would expect the fire which had started at the lowest point to make its way to the forecastle and the cabin via the region where there was a door between the cabin and the store where the water tank was situated. He therefore disagreed with Mitcheson.

There is also a phenomenon on which the two experts could not agree. In the engine room at the stern there was a piece of plastic sheet next to the engine which appeared to have been mounted onto or draped on the wall and which had melted and lay on the bench next to the engine. There were soot deposits on the wall at high level and on the ceilings. There was no sign of smoke invasion in the engine room. Mitcheson's evidence was that the description of the smoke escaping from the ventilation grill at the top of the mast as observed by the guards was consistent with a direct ignition and burning of the plastic sheet shortly before the smoke was seen. However, Dillon disagreed; he said that when a piece of plastic sheet was ignited and was on fire, it would drip and there would be droplets of molten plastic; but there were none. There was also no evidence of charring anywhere in the engine room. He further said that if one end of the plastic sheet was heated, the hot air would go up but would not cause damage to the other end, which was not the case here. In view of these, it seems to me that what Mitcheson said had happened to the plastic sheet was not feasible. Dillon attributed the melting of the plastic sheet to the high temperature – 270° celsius, he said – in the engine room which was caused by the hot air or smoke from the fire. This also was not feasible. As Mitcheson pointed out, the engine room was clean and free from the effects of fire. There was no sign of any invasion of smoke in the engine room. It was not possible for the engine room to be heated to 270° celsius. At that high temperature the wood in the engine room would have been burnt or scorched. There was no evidence of that. Dillon's explanation for the smoke coming out from the ventilation grill (as observed by the guards) was that the smoke from the smouldering fire at the bow section travelled along the void at the bottom of the hull to the stern and escaped through the ventilation grill. The smouldering fire could have flared up and then subsided, thus producing momentarily a small amount of smoke. That was disagreed on by Mitcheson whose evidence suggests that that was highly improbable.

I am far from convinced by Mitcheson's evidence of the seat and cause of the fire. The evidence as presented to me on which he based his conclusion was not satisfactory. He inspected the 'Super Trawl' on 17 August 1981, about 2½ months after the fire. He took a set of photographs and made some measurements of charring. He made no contemporaneous notes of his inspection, and arising from the investigation conducted no detailed or comprehensive report was ever prepared; in fact no report at all was produced. His evidence was based essentially on his recollection, the photographs and measurements. As an expert witness he struck me as somewhat partisan. On a couple of occasions he was unable to answer or rather refrained from answering specific questions. Dillon, on the other hand, I find was more objective. Dillon's explanation that the fire originated from a smouldering fire at the area near the water tank below the deck seems to me plausible. But, unfortunately, he did not have the advantage of inspecting the 'Super Trawl' after the fire and his views on the seat and cause of the fire were based on the photographs and documents produced and the notes of evidence of the early part of the trial and on what he was instructed. There lies the undoubted weakness of Dillon's evidence.

Having reviewed the evidence of both the experts I am still left in grave doubt as to where and how precisely the fire started. But the burden of proving that the fire was caused by the wilful act of the plaintiffs or with their connivance lies with the first defendants. Salmond J in *Slattery* v *Mance*[2] at p 681 said:

> In my judgment, once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue.

On the basis of Mitcheson's evidence, the case of the first defendants is that there were two things that Schneppe did on the day of 6 June 1981. First, when Schneppe went to the yard in the pick-up at about 3.30 pm he went on board the 'Super Trawl' and went to the engine room and ignited the piece of plastic draped on the wall, presumably to set the vessel on fire. There are several difficulties in the way of accepting this suggestion. In the first place, the evidence of Dillon was that the plastic sheet could not have been ignited in that way owing to the absence of droplets of plastic and of any charring in the engine room. In the second place, it would be extremely foolhardy for Schneppe to ignite the plastic sheet with a view to burning the vessel, because if a fire did develop out of the burning of that plastic sheet that would occur soon or immediately after he left the yard and the inference that he set fire to the vessel would in such circumstances be almost irresistible. Thirdly, the melted plastic on the bench in the engine room was never put to Schneppe and he was never asked whether it was in that condition before the fire and how and why it had melted. It seems to me that it was never a part of the case of the first defendants initially that Schneppe ignited the plastic sheet; it was improvised and developed in the course of the trial. When Schneppe was cross-examined it was suggested to him that his trip to the yard on the afternoon of 6 June 1981 was a 'recognizant trip to see if there (were) people at the yard'. There was not the slightest hint that he went on board the 'Super Trawl' and ignited the plastic sheet.

The second thing the first defendants suggested that Schneppe did was that in his second trip to the yard, that is, in the evening when he and his wife were alone on board the 'Super Trawl' after the guard left them and went to the guardhouse to fetch a torch, Schneppe with or without his wife's assistance but in her presence went to the cabin and applied flammable liquid on the floorboard in the cabin and ignited it. That was a possibility and there was that circumstantial evidence that they were left alone on board the vessel. But the interval between the time the guard left and the time the other guard came must have been only about five minutes. It would be extremely risky and again foolhardy for Schneppe, within this short space of time and knowing that the guard would return or the other guard might come, to set fire to the vessel by pouring flammable liquid and igniting it. Such an act, as I have said, was possible but, in my view, not probable. It is true that Schneppe and his wife were left alone on board the vessel. But it might well be that all that they did was look around at the stern or that they descended from the vessel and then a fire broke out in the bow section in exactly the way as described by Dillon, ie a smouldering fire transiting to a flaming fire by reason of the draught going in through the hatch in the engine room after the cover was lifted by Schneppe and the guard. That was also a possibility. There are two further reasons which militate against a finding that the fire started in the cabin and was caused by flammable liquid applied to the floorboard and ignited by human agency. First, there was no evidence of primary fact that flammable liquid was found anywhere in or near the cabin. PW3, the port chemist, went to investigate the fire the following morning and with an explosimeter could not find any inflammable vapour. Notwithstanding Mitcheson's opinion on the inability of the explosimeter to detect inflammable vapour in such circumstances, I find this piece of evidence very significant. Secondly, though I am not fully persuaded to accept the theory propounded by Dillon, his evidence has certainly cast serious doubts on the validity or soundness of the theory propounded by Mitcheson. I therefore find that the first defendants have not proved on a balance of probabilities that the fire was caused by the wilful act of Schneppe or with his connivance. This defence of the first defendants also fails. Accordingly I hold that the first defendants are liable to the plaintiffs under the fire insurance policy.

I now turn to the question of quantum. At the time of the fire the 'Coastal Monitor II' was still at an early stage of construction. According to the photographs, only a skeleton of the hull had been built. It was not burnt; according to the evidence of Peter F Dixon (DW1) and Mitcheson, that vessel had suffered no damage. The only evidence of damage was that given by Foedish (PW2) who said that there were cracks on the glue but 'the problems (he) said of the glue of the plywood in 'Super Trawl' did not apply to 'Coastal Monitor II'. I think that in all probability it was only the portside of the bow of the 'Coastal Monitor II' that sustained this damage which was caused by heat radiation from the fire on the 'Super Trawl'. It is significant that Foedish in his report of 22 June 1981 said that 'the stern and the forward part of the keel, frames etc (approximately one-third length counted from stem)' of the 'Coastal Monitor II' in their 'existing condition' were not acceptable for classification. There was no evidence why such damage in this section of the vessel could not be remedied or repaired. It was certainly capable of being repaired and made good. On the evidence, apart from what Foedish said, I find that the 'Coastal Monitor II' had not suffered any significant damage which could not be repaired. Even accepting what Foedish said, the plaintiffs were not entitled to treat the damage as a total loss, and they have not sought to prove their loss by showing the cost in-

volved in repairing the damaged part; nor have they proved their loss in any other way. I therefore make no award on the 'Coastal Monitor II'.

On the 'Super Trawl', the bow section, the forecastle and the cabin had been extensively damaged. According to Foedish the vessel was no longer acceptable for classification. He said, 'If you see the photographs, 'Super Trawl' was so heavily damaged. It cannot be repaired. It was impossible to repair. The heat must be very intensive, especially in the forward part of the vessel.' He said that the intensive heat had affected the glue and the glue was further damaged by the fire brigade spraying water thereon. Because of such damage he was of the view that there was no possibility of repair. Foedish also submitted a report on 12 June 1981, in which he showed very extensive damage of the 'Super Trawl'. That report was not challenged at all. The plaintiffs claimed for the entire costs of construction amounting to $668,115 and in support produced receipts and other documents. From this should be deducted a sum of $13,200 being proceeds of sale of the hull structures and other equipment, thus leaving a balance of $654,915.

The first defendants have not seriously disputed this quantum. They called Dixon as an expert who said that the wood had not been dried out by the fire and that the vessel could be repaired. But he did not show how the vessel could or should be repaired. Nor did he show any estimated costs of repair. He was not very credible as an expert witness as he was not an expert on wood and wooden boats, and he could not say very much on the effect of heat on wood and adhesives. Nor did the first defendants call any surveyors and adjusters to give evidence on whether any adjustment should be made to the amount of costs of construction. I therefore have no evidence to the contrary. In the circumstances, I allow the claim of the plaintiffs on the 'Super Trawl' to the extent of the amount insured. There will therefore be judgment to the plaintiffs against the first defendants for the sum of $600,000 with costs.

As I have found that there was no material misdescription of the property insured, the claim against the second defendants does not arise. However, since evidence has been led and arguments have been addressed to me, I ought to decide also on this issue as if there was a material misdescription. The second defendants are insurance brokers and the plaintiffs enlisted their assistance for the purpose of effecting the necessary insurance. In this connection I accept the evidence of Schneppe that he discussed with Robert Tan the question of insurance of the two vessels, and in particular he wanted to take out a marine policy but was advised by Tan that in the circumstances burglary and fire policies were appropriate ones. As the vessel in question, ie the 'Super Trawl', was still under construction, Schneppe was concerned with having the whole or complete value of the vessel, either built in or stored at the site, covered by insurance. As I have found, Tan at all material times was aware that the plaintiffs were building the two vessels and would like to effect insurance to cover them. It is not in dispute that each of the proposal forms was filled in and completed by Tan and the words 'complete unit of wooden fishing trawler ... etc' were written by Tan. I do not accept Tan's evidence that the term 'complete unit' came from Schneppe; it was devised by him which he thought would adequately describe the property to be insured. It is also not in dispute that Schneppe approved and agreed with the wording devised or written by Tan. However, there is nothing technical or difficult about the description given; the words used are easily understood and it is fully within the knowledge of Schneppe to determine whether the description was correct or otherwise. The obligation was clearly on the plaintiffs to describe the property to be insured and it was fully within the competence of Schneppe to give a correct description or correct a misdescription of the property insured. Accordingly, if there was any misdescription the plaintiffs had themselves to blame; their director, Schneppe, approved and adopted the description suggested by Tan.

On this point I find the case of *O'Connor* v *BDB Kirby & Co*[3] cited by counsel for the second defendants of some assistance. In that case, the plaintiff wished to take out insurance on his car and consulted an insurance broker. The latter filled in the proposal form for the plaintiff and in answer to a question as to where the car was normally kept at night inadvertently stated that it was in 'a private garage'. That was not correct. The proposal form was approved by the plaintiff who failed to notice this incorrect information. After the policy had been issued and while it was in force, the car which was parked outside the plaintiff's house was damaged. On a claim against the insurance company liability was repudiated on the ground that the proposal contained an inaccurate answer as to where the car was garaged at night. The plaintiff therefore claimed against the insurance broker for breach of contract and negligence. It was held by the Court of Appeal that it was the duty of the plaintiff to ensure that the information given to the insurance company was correct and since the plaintiff had failed to rectify the incorrect information given he was solely to blame. Davis LJ in his judgment said, at p 99:

> It is argued by Mr Norris that the failure of the assured properly to read the form was the cause of this loss, the cause of putting the insurance company in a position to repudiate liability. I think that Mr Norris is right in that regard ... And in each of those cases it was emphasized that it is the duty of the proposer for insurance to see and make sure that the information contained in the proposal form is accurate and not to sign it if it is inaccurate, and that he cannot be heard to say that he did not read it properly or was not fully appraised of its contents ... I think that the princi-

ple applies with equal force in this case. It would be different if the assured was unable to read or was in some degree illiterate. But there is no suggestion of that in this case. He was fully able to read this proposal form, although perhaps he could not have been able to read the copy we have, and there had been this discussion about the garaging of the car and its relevance to the amount of the premium, and it was there staring him in the face. If he did not read it properly, I think that he has only himself to blame ... it was the duty of the assured to have read that form; it was his application; he signed it and, if he was so careless as not to have read it properly, then in my opinion he has only himself to blame for his loss.

Megaw LJ said, at p 101:

When the broker took it on himself to fill in the proposal form, the duty upon him was to use such care as was reasonable in all the circumstances towards ensuring that the answers recorded to the questions in the proposal form accurately represented the answers given to the broker by the assured. But the duty was not a duty to ensure that every answer was correct.

Applying these principles here, Tan in filling in the proposal forms was under a duty to use such care as was reasonable in the circumstances towards ensuring that the information recorded therein accurately represented the information given to him by the plaintiffs. He recorded the information in the forms which he then passed on to Schneppe who read and approved them and signed the forms. Hence, in my opinion, if there was any misdescription in the proposal, the plaintiffs have themselves to blame and have no claim against the second defendants.

Counsel for the plaintiffs referred me to two cases in support of the plaintiffs' claim. The first is *London Borough of Bromley* v *Ellis*[4] where a broker was asked by the purchaser of a car to effect the transfer of the insurance of the car. In the course of effecting the transfer the broker failed to clear up a query raised by the insurance company and in consequence the insurance was cancelled and the broker again failed to inform the purchaser of the cancellation. Only after an accident had occurred was the plaintiff informed of the cancellation and as he had no claim against the insurer he successfully claimed against the broker. Lord Denning in his judgment said, at p 99:

The brokers were, I think, under a duty of care to look after Mr Ellis's interests. I know that the brokers were not his agents. They were agents for the insurance company; but, nevertheless, they were also under a duty to use reasonable care to Mr Ellis. He had asked them to arrange the transfer of the insurance. They had undertaken the duty of arranging the transfer. They had taken the proposal from him and got it filled in. They were clearly under a duty to arrange the transfer with reasonable care so as to see that he was protected.

The second case is *McNealy* v *The Pennine Insurance Co Ltd & Ors.*[5] There, the plaintiff was a property repairer and a part-time musician and through an insurance broker effected a comprehensive insurance policy with the insurance company. The insurance company's underwriting instructions, which were known to the broker, set out a list of risks not acceptable for insurance, including a full or part-time musician. Notwithstanding this, the broker placed the insurance with the insurance company and in the proposal form filled in by the broker the occupation of the plaintiff was described only as property repairer. Subsequently, the plaintiff had an accident and his car was damaged and a passenger was injured. He therefore claimed against the insurance company who repudiated liability, and he joined the broker as one of the defendants. The Court of Appeal held that it was the duty of the broker to use all reasonable care to see that the plaintiff was properly covered and that there was a breach of duty on the part of the broker. The broker was accordingly liable to the plaintiff.

The factual situations in both the cases were entirely different from that in the instant case and both of them have no application. The instant case is not one where an insurance broker has failed to effect the appropriate insurance; the appropriate insurance was effected. The complaint of the insurer is that there was a material misdescription in the proposal form, and surely the responsibility of giving a correct description must rest on the insured. In my opinion, the plaintiffs are not entitled to recover against the second defendants even if there was a material misdescription in the proposal forms. In the result, their claim against the second defendants fails and is dismissed with costs.

Order accordingly.

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Reported by *Ng Sheau Jiuan*